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No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

VS.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* FOR CALIFORNIA WOMEN LAWYERS, THE BAR ASSOCIATION OF SAN FRANCISCO AND THE BARRISTERS CLUB OF SAN FRANCISCO IN SUPPORT OF PETITIONER

ELIZABETH S. SALVESON*
NANCY A. WESTON
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center,
7th Floor
San Francisco, California 94111
Telephone: 415/434-1600

Attorneys for Amici Curiae
** Counsel of Record*

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INTEREST OF *AMICI CURIAE*

California Women Lawyers ("CWL") is a non-discriminatory state-wide bar association which advocates equal legal rights for women. Its affiliates include eleven of the largest local women's bar associations in California. CWL represents the interests of approximately 10,000 women lawyers in the state.

The Bar Association of San Francisco ("BASF") is a voluntary association of approximately 6,100 attorneys engaged in public and private law practice in the City and County of San Francisco, including many who practice as members of the largest law firms in our region. The Barristers Club of San Francisco is comprised of those members of BASF who have been in practice under five years or who are under 36 years of age; as such, it has a special interest in fair opportunities for career advancement. These associations have long recognized that women and minority attorneys should be afforded equal opportunity to advance in their professional careers, and have sought through various programs and committees to remedy the past imbalance in the profession.

Although significant strides have been made, and the percentage of women and minority attorneys has markedly increased in recent years, Amici are committed to the continuation of this trend toward the acceptance of women and minority attorneys in every phase of the legal profession, a goal which was plainly set by the enactment of Title VII in 1964. Amici acknowledge the worthy purpose of Title VII, and the vast remedial effect its broad application has had on employment practices throughout the nation. Amici are satisfied that no legitimate interests of the legal profession will be impaired by application of Title VII to the partnership decision here at issue. To the contrary, while many law firms pride themselves on maintaining uniformly high professional standards and collegiality among the partners, those laudable goals can be achieved without consideration of race, religion, national origin or sex. Indeed, a decision which may create an exodus of talented women attorneys from the ranks of private law firms would not only undermine the collegiality which male and female lawyers practicing in the same firm have developed and enjoy, but would adversely affect the overall well-being of firms which endeavor to maintain a practice of the highest possible caliber. Amici therefore affirm their support of the standards set forth in Title VII.

Moreover, as lawyers, Amici are mindful of the impact of the decision of the court below on public confidence in the legal profession. In striving for the respect of society in their role as champions of equal justice under law, members of the profession must not—and Amici do not—claim for themselves the right to discriminate on the basis of race, religion, national origin, or sex in selecting their partners. Amici therefore join together to urge reversal of a decision which both imperils the compelling goal of eradicating discrimination in all professional employment and threatens to erode public confidence in the legal profession.

SUMMARY OF ARGUMENT

I.

Advancement to partnership by an associate in a law firm is precisely the type of promotional opportunity which Title VII was designed to cover. Congress intended Title VII to reach all rungs of professional life, and partnership represents one of the higher steps in the legal profession. To the thousands of lawyers who work in law firms organized as partnerships, partnership represents not only the recognition of achievement in the practice of law, but the opportunity for increased responsibility, more diverse activity, and continued accomplishment. This avenue of career development must not deviate from the standards of fair employment set by Title VII.

II.

In two respects, the determination of whether an associate will become a partner at King & Spalding represents a "term, condition, or privilege" and an "opportunity" of employment subject to scrutiny by Title VII. First, King & Spalding has a policy to consider each of its associates for partner after a reasonable period of time. "Terms, conditions, or privileges" and "opportunities" of employment within the scope of Title VII are construed broadly, and include practices in the workplace which stigmatize a certain group of employees, as well as practices with economic impact. Because opportunity for partnership is held out as an incentive for associates, and because it

affects an associate's working environment, the partnership determination is an integral part of an associate's job conditions.

A second, and distinct, reason for the application of Title VII in this case is the existence of an "up or out" policy at King & Spalding. The discharge of Petitioner was inextricably tied to the determination to reject her from partnership. Partnership was therefore a "term" or "condition" of continued employment and the determination to reject Petitioner is subject to the standards set by Title VII.

III.

The application of Title VII in this case cannot be defeated by any associational interests of King & Spalding. Associational rights are not absolute, and the compelling governmental objective embodied in Title VII far outweighs any associational rights which may exist in the commercial context of the King & Spalding partnership. In all events, the First Amendment does not protect any asserted interest in practicing discrimination. The partnership therefore may not avoid the mandate of Title VII.

ARGUMENT

I.

THE HIGHER ECHELONS OF THE LEGAL PROFESSION ARE NOT EXEMPT FROM TITLE VII.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) was intended to assure that advancement in employment, including professional employment, would not be denied on the basis of race, color, sex, religion or national origin. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974) ("Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on [prohibited bases]"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("Title VII . . . to eliminate those discriminatory practices and devices which have fostered racially stratified job environments").

In the debate concerning a proposed exclusion from Title VII for physicians and surgeons, Senator Javits stated:

> "One of the things that those discriminated against have resented the most is that they are

> relegated to the position of the sawers of wood and the drawers of water; that only the blue-collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> • • •
>
> "Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them." (118 Cong. Rec. 3802 (1972))

See also EEOC v. *Rinella & Rinella*, 401 F. Supp. 175, 180 (N.D. Ill. 1975); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 980-82 (1982).

Congress—which defeated the proposed exemption for physicians (*see EEOC* v. *Rinella & Rinella, supra*, 401 F. Supp. at 179-80), and abolished an express exemption for academic appointments in 1972 (Equal Employment Opportunity Act, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 42 U.S.C. § 2000e(a) (1972) (amending 42 U.S.C. § 2000e(a) (1970)))—intended to eradicate barriers preventing women and minorities from reaching *all* rungs of professional life, and contemplated no exemption for lawyers. *See McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 (1976) (Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees"). Just as courts have applied Title VII to a university's determination of whether to award tenure to a professor (*Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980); *Abramson* v. *University of*

Hawaii, 594 F.2d 202, 207-10 (9th Cir. 1979); *cf. Delaware State College v. Ricks*, 449 U.S. 250 (1980) (denial of tenure before amendment of Title VII to omit exemption for educational institutions not subject to review)), so must it apply to a decision whether to promote an associate lawyer to partner. *See* Note, *Tenure and Partnership As Title VII Remedies*, 94 HARV. L. REV. 457, 459 (1980) ("Tenure and partnership are badges of success in the academic and legal worlds").

The application of Title VII to the practice of law has been consistently affirmed. It applies to secretaries in law firms (*EEOC v. Rinella & Rinella, supra*), to summer law clerks (*Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974)), to the hiring of attorneys (*Frausto v. Legal Aid Society*, 563 F.2d 1324 (9th Cir. 1977) (attorney for legal aid society); *Milton v. Bell Laboratories, Inc.*, 428 F. Supp. 502 (D.N.J. 1977) (in-house attorney for corporation); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (law firm attorney)), and to the promotion of attorneys (*Neale v. Dillon*, 534 F. Supp. 1381 (E.D.N.Y. 1982) (failure to promote assistant district attorney to deputy bureau chief); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977) (failure to promote associate to partner)). Before the decisions by the lower courts in this case, the only decision addressing the question of whether promotion of an associate to a law firm partnership was covered by Title VII was *Lucido v. Cravath, Swaine & Moore, supra*. In a logical and persuasive opinion, the court held Title VII applicable. *See* Section II(A), *infra*. In its opinion below, the Eleventh Circuit disagreed. *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, ____ U.S. ____, 51 U.S.L.W. 3552 (Jan. 25, 1983). The effect of that decision is to withdraw the beacon of the fair employment laws from an important career step for thousands of lawyers.[1]

[1] Lawyers in large firms represent a very substantial number of the total number in practice. As of 1980, 70% of the 535,000 lawyers in this country were engaged in private practice. Middleton, *You're Not Alone: Half Million Lawyers in U.S.*, 67 A.B.A. J. 1098 (1981). Of those, 47% practiced solo and 53% practiced in firms. *Id.* Firms with more than 20 lawyers accounted for 13% of all practicing lawyers. *Id.* at 1099.

Advancement from an associate position to partnership in a law firm (or election to the board of directors in a professional law corporation[2]) is a step which at once reflects and permits professional growth and development. The progression from associate to partner brings with it the opportunity for increased supervision of other lawyers, increased client contact and responsibility, and more diverse professional activities. Countryman, Finman & Schneyer, THE LAWYER IN MODERN SOCIETY 35 (2d ed. 1976). Indeed, an associate's professional development in a law firm has very real limitations until he or she is admitted to partnership:

> "[A]ssociate lawyers are employees and are supervised. This means they do not meet one of the criteria of the professional model. Supervision limits their personal responsibility and individual authority. It limits them in terms of the kind of assignments they receive, the client with whom they have to work, the extent to which they can work a matter through on their own." (*Id.* at 34)

Another commentator concludes that "an associate should aspire to become a partner. He should view his associate status as an apprenticeship, with full admission to the craft occurring only when he's joined the partnership ranks." Freund, LAWYERING, A REALISTIC APPROACH TO LEGAL PRACTICE 5 (1979).

This general recognition that election to partnership represents career advancement, in the sense of increased opportunity for achievement and recognition in the practice of law, is also

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[2] The court below did not address the question of the application of Title VII to a professional law corporation and, indeed, was apparently compelled to its decision because of its perception that in this case "the [partnership] form *is* the substance . . . ." *Hishon v. King & Spalding*, *supra*, 678 F.2d at 1028. Amici therefore do not address the issue of whether election of an associate to the board of directors of a professional corporation would be covered by Title VII, except to note that plainly the application of Title VII should not depend on whether the law firm is a partnership or a professional corporation—a determination based, up to now, on tax and personal liability considerations. *See, e.g.*, Diamond, *Why a Law Firm or Its Partners Should Incorporate*, PRAC. LAW., July 15, 1982 at 55, 56. ("Professional corporations . . . [are] nothing more than a different legal format for conducting a professional practice"); Middleton, *Larger Law Firms Ponder Corporate Step*, 67 A.B.A. J. 693 (1981).

reflected in the King & Spalding partnership agreement. That document specifies that "[e]ach partner . . . shall devote his full time and attention to the business of the firm"—"the general practice of law"—unless a special arrangement is reached. King & Spalding Partnership Agreement, ¶3 (R.161, J.A.153).[3] The major role of the King & Spalding partners is therefore the practice of law. Naturally, continued practice and added responsibility contribute to the professional development of all lawyers, including partners, at King & Spalding. Thus, the main feature of partnership at King & Spalding, as in most law firms, is the opportunity for a lawyer to reach the peak of his or her profession through increased responsibility and continuing development as a counselor and an advocate.

The rejection of otherwise-qualified attorneys from such career advancement on the basis of race, color, sex, religion, or national origin, we submit, was never intended to be and is not now tolerated by Title VII of the Civil Rights Act of 1964.

II.

ADMISSION TO PARTNERSHIP IS ONE OF THE "TERMS, CONDITIONS, OR PRIVILEGES" AND "OPPORTUNITIES" OF EMPLOYMENT AT KING & SPALDING.

A. The King & Spalding Policy Of Employing Associates With The Expectation That They Will Be Considered For Partnership Within A Reasonable Period Of Time Is A "Term, Condition, Or Privilege" And "Opportunity" Of Employment.

As alleged in the complaint, and by Respondent's own admission, all associates at King & Spalding "are employed with the expectation that they will be considered for invitation to partnership on a fair and equal basis within a reasonable

[3] The management of the partnership, with authority "to make any and all decisions, commitments and contracts with respect to the operation and management of the firm," is delegated to a management committee. King & Spalding Partnership Agreement, ¶14 (R. 170-71, J.A. 162-63).

period of time if they meet the firm's standards for partnership." Answer to Complaint, ¶ 8(b) (R.26; J.A.30-31); Complaint, ¶ 8(b) (R.6; J.A.9-10).

Title VII by its express terms requires that the decision whether to extend to an employee a privilege or an opportunity of employment available at the employer company must be made without discrimination on account of race, color, religion, sex or national origin:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a)(1) and (2) (emphasis added))

In this case the question presented is whether the opportunity for advancement to partnership is within the "terms, conditions, or privileges" or "opportunities" of employment. In this inquiry it is plain that associates at King & Spalding are employees as defined by Title VII. 42 U.S.C. § 2000e(f); *see Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y 1975). Thus, if consideration for partnership qualifies as a "term, condition, or privilege" or "opportunity" of employment, then the decision whether to offer partnership is covered by Title VII without regard to whether the associate remains an employee upon becoming a partner. As the court reasoned in *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953):

> "At the time the discrimination took place [the complainant] was clearly a protected employee, and

> his prospects for promotion were among the conditions of his employment. The [National Labor Relations] Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected." (*Id.* at 237)

See also Golden State Bottling Co. v. NLRB, 414 U.S. 168, 188 (1973) (damages for unfair labor practice calculated on basis of wages petitioner would have earned but for discharge, even though part of such wages was based on promotion to position in which petitioner would not be covered under National Labor Relations Act).

Properly interpreted and applied, Title VII must cover the decision whether to admit associates to partnership at a firm which, as a matter of policy and practice, considers associates for partnership after a reasonable period. Indeed, Professor James White, in an early study of women in the law, concluded there could be no other analysis of the issue:

> "[T]o say that the prospect of becoming a partner is not one of the attributes or 'privileges' of employment with a law firm is to ignore reality. . . . Undoubtedly the prospect of . . . partnership and the added compensation which it is expected to bring can offset other detriments of a job, such as comparatively low beginning pay or undesirable working conditions. Thus, I classify the opportunity to compete for a partnership position as one of the 'privileges' of employment of which the act speaks." (White, *Women in the Law*, 65 MICH. L. REV. 1051, 1106 (1967))

Economic benefits made available to employees by their employers are "terms, conditions, or privileges" or "opportunities" of employment which fall within the purview of Title VII. The most obvious example is the opportunity for promotion, with its normally attendant increase in compensation. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 329, 337-38 (1977); *Watkins v. Scott Paper Co.*,

530 F.2d 1159, 1177 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); *United States v. Local 189, United Papermakers*, 301 F. Supp. 906, 918 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Likewise, fringe benefits of employment cannot be denied or reduced on the basis of race or sex, even when those benefits are not calculated or payable until after the termination of a person's "employee" status. *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978) (pension plan); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976) (retirement plan); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (pension plan); *Taylor v. Goodyear Tire & Rubber Co.*, 6 Fair Empl. Prac. Cas. (BNA) 50 (N.D. Ala. July 31, 1972) (sickness and accident benefits); *Mixson v. Southern Bell Telephone & Telegraph Co.*, 334 F. Supp. 525 (N.D. Ga. 1971) (death benefits).

In applying Sections 2000e-2(a)(1) and (2), courts have been concerned not only with benefits or practices with an economic impact on employees, but also with those having a psychological impact, giving an expansive interpretation to "terms, conditions, or privileges of employment" and "employment opportunities" consonant with the remedial purposes of the statute. In his opinion for the court in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 957 (1971), Judge Godbold noted that:

> "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." (*Id.* at 238)

The court went on to hold that "the phrase 'terms, conditions, or privileges of employment' in Section 703 [42 U.S.C § 2000e-2(a)(1)] is an expansive concept" (*id.*), including within its scope the creation of a working environment heavily charged with discrimination. *See also Henson v. City of Dundee*, 682

F.2d 897, 901 (11th Cir. 1982); *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

Certainly discrimination in the partnership decision will deprive women and minority attorneys of economic benefits by narrowing the prospect of increased compensation. Perhaps more disturbing is the likelihood that such discrimination will infect their working environment and job opportunities while they are associates. If a law firm perceives that it is free to discriminate in the partnership decision, then it may treat women and minority associates differently, giving work assignments which do not provide the opportunity for these associates to demonstrate their ability to practice law at a level of competence which commends them for partnership, or giving them the least desirable projects.[4] If women and minority associates are subjected to such practices, they will quickly become an underclass within the law firm. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) ("statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"). Moreover, because of the possibility that race or sex may enter into the partnership decision, women or minority associates may feel compelled to embrace a field of legal practice which conforms to stereotypical notions of the field in which they "should" practice, rather than that in which their talents and interests may lie. *See* White, *supra*, 65 *Mich. L. Rev.* at 1062 (data reflecting higher proportion of female attorneys engaged in trusts and estates, domestic relations and tax "accord with the commonly held beliefs about women's practice"); *cf. Mississippi University for Women v. Hogan*, ___ U.S. ___, 50 U.S.L.W. 5068, 5071 (July 1, 1982) (sex-based discrimination in nursing school admissions "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"). Thus, in a very real sense, if discrimination in the

[4] Indeed, Petitioner has alleged that Respondent "failed and refused to give [Petitioner] work assignments that would contribute to her career advancement." Complaint, ¶17(e) (R.10, J.A.12).

partnership decision is tolerated, the professional development of women and minority associates can be permanently stunted.

The fact that the employment opportunity at issue in this case—partnership—may carry with it additional ramifications does not create a distinction which justifies exemption from Title VII. As the Ninth Circuit has recognized, eligibility to become a part-owner in a company is subject to Title VII when job opportunities are tied to such stock ownership. *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982). In *Bonilla* minority employees challenged their employer's policy of permitting only persons of Italian ancestry to own shares in the employer company, a garbage collection business. The complaint alleged that those shareholders who worked for the company assigned to themselves the management jobs and route driver positions which were considered the most desirable. *Id.* at 1300. Although the defendant argued that Title VII did not apply to discriminatory sale of its corporate stock, the court held to the contrary:

> "The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment. . . . At least a quarter of its employees are stockholders, each of whom binds himself or herself under the by-laws and stockholders' agreement to permanent, full-time employment." (*Id.* at 1302)

Thus observing the close ties between share ownership and employment, and noting the company's restriction on transfer of shares, the court held that under such circumstances "the admittedly discriminatory employment practices of the Company are within the reach of Title VII in spite of the effort to characterize those practices as 'proprietary rights.'" *Id.* at 1302-04. *See also EEOC v. First Catholic Slovak Ladies Association*, 694 F.2d 1068 (6th Cir. 1982) (eligibility for board of directors in non-profit organization subject to standards of Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967), when board membership is prerequisite to

appointment as a salaried officer)[5]; *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811, 815 (N.D. Ala. 1970), *rev'd on other grounds*, 494 F.2d 211 (5th Cir. 1974) (right to serve as member of company management board which controlled shares of stock of company held to be "a valuable term, condition or privilege of employment at [company] and therefore falls within the express coverage of Title VII").

The decision in *Bonilla* goes further than the Court need go in this case. There, the opportunity for a more desirable position was controlled by the employee's status as an owner in the company. Under such circumstances, the court indicated that the company must extend to all its employees an equal opportunity to purchase stock. In this case, King & Spalding already has a policy of considering all its associates for partnership after a "reasonable period." Having thus made partnership an incentive for accepting and continuing employment with the firm, the partnership decision has become an integral part of an associate attorney's job opportunities. The ruling Amici urge would merely require that this existing opportunity be administered fairly. The fact that the decision also involves an in-

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[5] Although the district court believed it inappropriate to apply the ADEA to "an internal decision on who should govern and set broad policies for the organization" (*id.* at 1070), the court of appeals emphasized the work-related aspects of the position and held:

> "A determination of whether an individual is an employee and therefore covered by the protections of ADEA should not center on the label which the organization has chosen to give to the position. By emphasizing that these women held elected positions as officers and directors, the District Court failed to assess accurately their true status. These individuals performed traditional employee duties: maintaining records, preparing financial statements, managing the office. They were responsible for their work to the governing body of the organization and they drew salaries as employees. Their participation on the policy-making Board of Directors does not detract from their primary role as employees." (*Id.*)

Thus, where the principal obligations of a position are "traditional employee duties", the fact that the position also may be an elected post does not prevent application of the employment discrimination laws.

vitation to become part-owner of King & Spalding cannot be considered an impenetrable barrier to the application of Title VII, especially when the overriding aspect of a partner's role at the law firm is to continue practicing law.[6]

In a decision precisely on point with this case, the court in *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), held that "the opportunity to become a partner at Cravath was a 'term, condition or privilege of employment' and an 'employment opportunit[y]' within the meaning of the Act." *Id.* at 127. In that case, as in the case now before the Court, the plaintiff had alleged that associates at Cravath were employed "with the understanding that after a reasonable period of time they will be afforded the opportunity of being promoted to partnership if they perform their duties as associate attorneys satisfactorily." *Id.* at 128. Given these facts, the court was led inexorably to the conclusion which is also required in this case: The opportunity to become a partner at the defendant law firm was a "term, condition or privilege" or "opportunity" of employment within the meaning of Title VII and must therefore be offered or declined based on factors which do not include race, color, sex, religion or national origin. *Id.*

This Court must decline King & Spalding's invitation to hold that law firm partnership may be denied because an associate is a woman (or black, or Native American, or a member of an otherwise-protected group). Such a result would

[6] This case, which arises in the context of a law partnership, provides an additional reason for recognizing close ties between ownership and employment. Because the Code of Professional Responsibility prohibits non-lawyers from owning or sharing in the profits from a business which engages in the practice of law (MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3 (1980); *id.*, DR 3-102 and DR 3-103), law firms are not organized by financiers who then hire management to run the company profitably for the benefit of the financiers. Instead, profit from the practice of law may only be paid to those who *practice* it.

It is ironic that Respondent's partnership form, which it urges requires a result which would indulge discrimination, derives historically from principles contained in the Code of Professional Responsibility, a code which counsels each attorney to conduct himself or herself so as to deserve "the respect and confidence of the members of his profession and of the society which he services . . . ." *Id.*, Preamble.

permit young attorneys to be thwarted in the development of their professional careers solely because of their race, color, sex, religion or national origin. Because discrimination-free career advancement is plainly the object of Title VII, law firm partnership, with its attendant benefits (increased income, increased responsibility and increased job security), should not be placed beyond the scrutiny of Title VII because of the partnership form which members of the legal profession frequently assume in order to carry on practice.

B. King & Spalding's "Up Or Out" Policy Makes Partnership A "Term" Or "Condition" Of Employment.

King & Spalding maintains another policy—that an associate who is considered and rejected for partnership must leave the firm. Complaint, ¶17(b) and (c) (R.10; J.A.12). This "up or out" policy—which plainly affects an associate's employment—provides an independent basis for applying Title VII to the consideration of Petitioner for partnership. In his dissent, Judge Tjoflat recognized that tying continued employment at King & Spalding to election to partnership had a direct bearing on Petitioner's discharge from employment. *Hishon v. King & Spalding, supra*, 678 F.2d at 1030 (Tjoflat, J., dissenting). Effectively, King & Spalding's policy makes partnership a "term" or "condition" of continued employment by a senior associate, within the meaning of Section 2000e-2(a)(1).

The courts have exhibited no reluctance to pierce to the core of a policy or practice which affects employment in order to determine whether it is contaminated by unlawful discrimination. Thus, for example, if a business makes stock ownership a prerequisite to assignment of the most desirable duties, it necessarily subjects the decision to permit or deny the right of stock ownership to the standards of Title VII. *Bonilla v. Oakland Scavenger Co., supra.* Likewise, a non-profit organization cannot make board membership a prerequisite to appointment as a salaried officer in the association unless board membership is unlimited by discriminatory strictures. *EEOC v. First Catholic Slovak Ladies Association, supra.*

The same scrutiny must be given to the discharge of Petitioner. When discharge of an employee results from the refusal to extend the opportunity of advancement, that refusal is subject to the standards of Title VII. Thus, in *Timper v. Board of Regents*, 512 F. Supp. 384, 394 (W.D. Wis. 1981), the court applied Title VII to a denial of tenure which had resulted in plaintiff's discharge pursuant to an "up or out" policy. *Cf. Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period begins with the decision to deny tenure to a professor, not when effect of that decision—eventual termination—occurs). Likewise, the decision not to offer partnership to Petitioner led directly to her termination and is subject to review.

Because King & Spalding makes election to partnership a condition for continued practice with the firm, Title VII demands that the decision to invite an associate into the partnership not be based on race, color, sex, religion or national origin. Any other result would insulate the dismissal of associates for discriminatory reasons, simply because the decision takes the form of rejection from partnership. That is, so long as a firm like King & Spalding *hires* women and minority lawyers as associates, it would be free to discharge all of them merely by declining partnership some years later. As Judge Tjoflat concluded, "when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment, . . . Title VII applies." *Hishon v. King & Spalding, supra*, 678 F.2d at 1030.

III.

TITLE VII IS NOT UNCONSTITUTIONAL AS APPLIED TO KING & SPALDING'S CONSIDERATION OF PETITIONER FOR PARTNERSHIP.

In deciding that Title VII does not apply to the decision to make an associate lawyer a partner, both the district and circuit courts expressed paramount concern for King & Spalding's rights of free association. "The very essence of a partnership is the voluntary joinder of all partners with each other" (*Hishon v. King & Spalding, supra*, 678 F.2d at 1028), the Eleventh Circuit declared. "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." *Id.* at

1026; *see also Hishon v. King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶31,703, at 20,064 (N.D. Ga. Nov. 28, 1980). Neither court was able to muster significant case or legislative support for its conclusion, however,[7] and the applicable precedent overwhelmingly demonstrates that the associational interests of King & Spalding are not entitled to the extreme solicitude shown by the courts below.

First, associational interests are by no means absolute. Rather, "even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and . . . avoid[s] unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Thus, asserted associational interests often fall before the compelling governmental interest in prohibiting discrimination. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1970) (racially exclusive private school subject to 42 U.S.C. § 1981); *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982) (men's civic organization subject to Minnesota statute prohibiting, *inter alia*, sex discrimination by public business facility). Title VII, which "provides . . . a clear mandate from Congress that no longer will the United States tolerate . . . [employment] discrimination" (*Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)), embodies such a compelling governmental interest. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) ("policy of outlawing . . . discrimination should have the 'highest priority'") (*quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975) ("national labor policy embodies the principles of non-discrimination as a matter of highest priority"). By thus proscribing discrimination in private employment, Congress has "not run afoul of the First Amendment." *United States Jaycees v. McClure*, *supra*, 534 F. Supp. at 771; *see Norwood v. Harrison*, 413 U.S. 455, 470 & n.10 (1973).

[7] The District Court relied on dicta from Justice Goldberg's concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 313 (1964) ("[I]t is the constitutional right of every person . . . to choose his social intimates and business partners solely on the basis of personal prejudices including race"), a case decided on June 22, 1964, *prior* to the enactment of Title VII on July 2, 1964. Pub. L. 88-352; 78 Stat. 253; 42 U.S.C. §§ 2000e *et seq.*

Congress has recognized that associational interests do exist in some employment situations, and has balanced those interests with the compelling national interest in eradicating employment discrimination by creating certain exceptions to the general proscriptions of Title VII. Thus, businesses of fewer than fifteen employees are exempt from coverage under Title VII (42 U.S.C. § 2000e(b)), as are bona fide private membership clubs (*id.* § 2000e(b)(2)),[8] and religious organizations may discriminate in favor of their adherents (*id.* § 2000e-1). Congress deemed that these discrete exemptions were sufficient to maintain the appropriate balance between associational interests and the generally overriding public interest in eliminating employment discrimination. Thus, in *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (*see* Section II(A), *supra*), the court held that shareholders in a large family-run concern did not have an associational interest which outweighed the compelling need for a broad application of Title VII:

> "We reject the Company's argument that its legitimate interest in protecting its family members overrides the countervailing national interest in eliminating employment discrimination based on race and national origin. . . .
>
> "We emphasize that our decision by no means interferes with the capacity of the proprietors of a small family-owned business, or, for that matter, any small business, to conduct its affairs with heightened solicitude for family or friends. . . . In 1972 Congress amended the section [42 U.S.C. § 2000e(b)] to exclude from coverage employers with fifteen or

[8] It is significant that the exemption for private clubs is construed exceedingly narrowly; even where one might expect associational interests to be strongest, courts have found the broad Congressional intent of eradicating discrimination to overcome all but the clearest examples of bona fide private membership clubs. *See Quijano v. University Federal Credit Union*, 617 F.2d 129, 132 (5th Cir. 1980) ("very precise and limited exception in Title VII" not applicable to a non-profit, tax-exempt membership credit union); *Fesel v. Masonic Home of Delaware, Inc.*, 428 F. Supp. 573 (D. Del. 1977) (private retirement home affiliated with private membership club); *Mills v. Fox*, 421 F. Supp. 519, 523 (E.D.N.Y. 1967) (private nursing home).

> fewer employees . . . . The inclusion of this provision demonstrates Congress's due regard for the special concerns of smaller businesses. . . . We will not dilute Title VII's imperative by altering the balance Congress has already struck." (*Id.* at 1303-04)

The lower courts' solicitude for King & Spalding's associational interests upsets this balance and supplies an additional exemption to the scope of Title VII not intended by Congress.

Any associational interests the King & Spalding partners have in choosing their partners are present in many other employment contexts covered by Title VII. No reason appears for the special deference for law partnerships evinced in the decision below, as compared with the many other equally "sensitive" or "collegial" settings in which Title VII proscribes employment discrimination. Thus, for example, Title VII is routinely applied to such positions as college faculty (*see, e.g., EEOC v. Tufts Institution of Learning*, 421 F. Supp. 152, 157, 164 (D. Mass. 1975)), bank officers (*EEOC v. Akron National Bank & Trust Co.*, 497 F. Supp. 733 (N.D. Ohio 1980)), firefighters (*Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973)), police officers (*Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980)), prison guards (*Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980)), doctors (*Joshi v. Florida State University*, 646 F.2d 981 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982)), and other positions of a professional, supervisory or managerial nature (*Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 543-46 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981); *EEOC v. Rinella & Rinella*, 401 F. Supp. 175, 179-80 (N.D. Ill. 1975)).

Moreover, in the commercial context presented here, associational rights are entitled to substantially less solicitude than in the political or social context in which such rights have traditionally been recognized. *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 129 (S.D.N.Y. 1977). "[C]ommercial activity . . . occupies 'a subordinate position on the scale of First Amendment values' . . . ." *United States Jaycees v. McClure, supra*, 534 F. Supp. at 771 (*quoting Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978)).

In all events, the First Amendment does not shield the practices at issue here. King & Spalding's protected associational interests do not include an interest in discriminating on the grounds proscribed by Title VII. Rather, this Court has declared that "the Constitution . . . places no value on discrimination . . . . Invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Norwood v. Harrison, supra,* 413 U.S. at 469-70. Thus, in *Runyon v. McCrary,* 427 U.S. 160 (1976), the Court declared that, while the belief that racial segregation is desirable may be promoted and subscribed to under the protection of First Amendment principles, "it does not follow that the *practice* of excluding racial minorities from such institutions [holding those beliefs] is also protected by the same principle." *Id.* at 176. *See also United States Jaycees v. McClure, supra,* 534 F. Supp. at 771 ("While the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection"). In short, equal employment opportunity is simply not to be subordinated to the "associational" interests of the members of the discriminating body. *United States v. International Longshoremen's Association,* 460 F.2d 497, 501 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972) (members of historically segregated unions had no protectable associational interests in preserving segregation).

For many of these reasons, the court in *Lucido v. Cravath, Swaine & Moore, supra,* 425 F. Supp. 123, determined that the First Amendment was no barrier to a claim identical to that presented by Petitioner. As that court concluded:

> "Application of Title VII to this case does not prevent the partners from associating for political, social and economic goals. The discretionary, subjective judgment that necessarily goes into the . . . partnership promotion process . . . [is] not limited by the application of Title VII except to preclude factors of race, color, religion, sex, or national origin from being considered in this promotion process." (425 F. Supp. at 129)

CONCLUSION

For all the foregoing reasons, Amici urge the Court to fulfill the mandate of Title VII that professional opportunity not be denied to lawyers on the basis of sex, race, religion, or national origin, and to reverse the decision of the court below.

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Respectfully submitted,

ELIZABETH S. SALVESON*
NANCY A. WESTON
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation

By _____
ELIZABETH S. SALVESON

Attorneys for Amici Curiae
California Women Lawyers,
the Bar Association of
San Francisco, and the
Barristers Club of San Francisco

**Counsel of Record*